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IN THE

Supreme Court of the United States

LONNELL BREWER,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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In opposing *certiorari*, Respondent attempts to divert attention from the indisputable split of authority among and within the circuit courts of appeals on the issue of employer liability for intermediate supervisor bias. To do so, Respondent seriously misconstrues relevant precedent. Respondent also argues disputed "facts" that are not only irrelevant to the decision whether to grant *certiorari*, but that are also improperly argued given the procedural posture of the case.

In the prior Term, the Court granted a writ of *certiorari* on the same issue in controversy here, i.e., "[u]nder what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, when the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee." Pet. for Writ of *Certiorari*, *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004); *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341); *cert. dismissed*, 127 S. Ct. 1931 (U.S. Apr. 12, 2007). Incredibly, Respondent nonetheless maintains that "there is no actual conflict among the circuits" (Resp. Br. at 6), and seeks to prove its point by piecing together language from the various lower court opinions in a vain effort to create the appearance of consistency (*id.* at 6-12). In so doing, however, Respondent powerfully illustrates the ambiguity and uncertainty resulting from the inconsonant holdings and inconsistent language found in the lower courts' intermediate supervisor bias, or "cat's paw," cases.

Respondent also inappropriately argues the "facts" of the case in an attempt to discourage this Court's review of the legal issue presented. Yet, as Respondent acknowledges (Resp. Br. at 5-6 n.3), based on the procedural posture of the case, the Court must view all disputed facts in the light most favorable to Petitioner. As the Seventh Circuit held below (Pet. at 20a-21a), the facts are more than sufficient to find at the summary judgment stage that Petitioner was subjected to the racial bias of an intermediate supervisor, and that the intermediate supervisor's bias played a crucial role in Petitioner's termination. The legal issue, then, is clearly presented: whether an employer, whose decision was influenced by an intermediate supervisor's discriminatory bias, can be held liable under Title VII, and, if so, the correct legal standard to impose liability. The Court's answer to that question will not only determine the fate of Petitioner's case, but it will also provide much-needed guidance to employees, employers, and the trial and appellate courts deciding these cases.

I. There is a Significant Circuit Split on the Appropriate Standard for Dealing With Intermediate Supervisor Bias.

As demonstrated by Petitioner (Pet. at 15-22), there is a significant circuit split regarding the appropriate standard to impose Title VII liability when an intermediate supervisor's bias is a factor in an adverse employment action. This Court has twice recognized a need to resolve this split. As discussed *supra*, the Court granted *certiorari* on this issue just last Term in *BCI*. Prior to that, in 2005, the Court asked the Solicitor General to file a brief expressing the views of

the United States on this issue in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc); *pet. for cert. dismissed*, 543 U.S. 1132 (U.S. January 25, 2005) (No. 03-1443). In both cases, however, the Court was precluded from clarifying the correct legal standard because the parties withdrew the cases before the Court could consider the issue.

Although many courts, including the Tenth Circuit in *BCI*, 450 F.3d at 486-88, and the Seventh Circuit in this case (Pet. at 26a-27a), have expressly acknowledged both the circuit split and the multiplicity of standards, Respondent disingenuously attempts to confuse the Court by asserting that, despite widely varying language in their opinions, lower appellate courts have "uniformly" applied a "results in" standard. (Resp. Br. at 7.) That is simply incorrect.

First, the "results in" standard for which Respondent argues has no basis in either the language of Title VII[1] or the cases decided by the lower courts—including those cited by Respondent. The "results in" standard, instead, introduces a brand new terminology in a futile attempt to synthesize the diverse lower court opinions. Far from helping its argument, Respondent's academic exercise works only to demonstrate further the extent to which the lower courts are deciding intermediate supervisor bias cases based on ambiguous and inconsistent legal formulations.

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[1] Title VII provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

Second, the "results in" standard urged by Respondent would effectively repeal the 1991 amendment to Title VII. Congress sought in 1991 to clarify the standard of causation in Title VII cases, making clear that a plaintiff can establish an unlawful employment practice if race was "a motivating factor" in the final decision. (Pet. at 24-26.) If this Court were to adopt the "results in" standard, it would render meaningless the 1991 amendment; the "results in" standard is concerned only with whether the intermediate supervisor's bias resulted in a tangible employment decision and not whether that bias was a "motivating factor" in the decision.

Respondent's misstatement of the cases is best exemplified by its assertion that the Fourth Circuit's decision in *Hill* is consistent with cases from other circuits. (Resp. Br. at 11-12.) In *Hill*, the Fourth Circuit expressly distinguished itself from its sister circuits, which have permitted an employer to be found liable when a biased intermediate supervisor played a role in an adverse employment action. 354 F.3d at 289-290. The Fourth Circuit required instead that the intermediate supervisor be the "actual decision-maker." *Id.* at 291. The Fourth Circuit's deviation from other circuits is unmistakable, and other courts have repeatedly recognized its unique approach. Only three years ago, for example, the Seventh Circuit explicitly *rejected* the Fourth Circuit's "actual decision-maker" standard. *Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004) (noting that the Fourth Circuit's standard for employer liability in intermediate supervisor bias cases "is not the view of this court"). The Tenth Circuit also explicitly rejected the Fourth Circuit's "actual decision-

maker" standard, stating: "[That] standard . . . undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *BCI*, 450 F.3d at 487.

II. Resolving this Issue is Necessary to Prevent Continued Confusion in the Lower Courts and to Provide Clear Guidance to Employees and Employers Alike.

This case presents another opportunity for the Court to resolve substantial confusion among the lower courts, which are often forced to choose between and apply conflicting legal standards. (*See* Pet. at 22-23.) In the limited time since Mr. Brewer's Petition was filed, the lower courts have continued to struggle to understand and apply the several competing standards for employer liability. For example, in *Poland v. Chertoff*, No. 05-35508, 2007 WL 2069651, at *5-*6 (9th Cir. July 20, 2007), the court acknowledged the continued inconsistency in the law as it "consider[ed] three potential rules to govern when a subordinate's bias will be imputed to an employer": (i) the "but for" causation standard articulated in *BCI*; (ii) the "actual decision-maker" standard articulated in *Hill*; and (iii) the "influence" standard articulated in *Bergene v. Salt River Project Agricultural Improvement Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001), and *Laxton v. Gap, Inc.*, 333 F.3d 572, 584 (5th Cir. 2003).[2]

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[2] The *Poland* court ultimately utilized the "influence" standard, holding that,

If the various federal courts have such trouble consistently interpreting these conflicting legal precedents, then employers and employees clearly do not have the direction they need to determine their rights and obligations in situations involving intermediate supervisor bias. Large corporations may justifiably believe that the extent of their liability in such cases varies depending on the geographic location of the office where the bias manifests. There are real-life implications to the uncertainty in the federal courts. Without guidance from this Court, these fissures in Title VII analysis will only widen.

III. This Case is a Proper Vehicle for the Court to Decide the Correct Legal Standard in Intermediate Supervisor Bias Cases.

Realizing, perhaps, that its argument on the case law is, at best, unconvincing, Respondent seeks to divert the Court's attention by arguing "facts" that are not only irrelevant to the decision whether to grant *certiorari*, but that are also improperly argued given the procedural posture of the case.

For example, Respondent alleges that Petitioner altered the parking tag "without having any

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> [I]f a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the *allegedly independent* adverse employment decision was *not actually independent* because the biased subordinate influenced or was involved in the decision or decisionmaking process.

Poland, 2007 WL 2069651, at *20 (emphasis added).

permission to do so." (Resp. Br. at 3.) This claim is decidedly false if viewing the facts in the light most favorable to Petitioner. Petitioner's immediate supervisor, Kerrin Thompson, indicated to Petitioner that he could use the parking tag to park at the Personnel Services Office (PSO) or the building where the University's Institute of Labor and Industrial Relations (ILIR) resided. (Pet. at 3a-4a.) Having received from Ms. Thompson permission to use the tag for the ILIR lot, Petitioner reasonably could have believed that he had permission to write that lot number on the tag. Whether Petitioner's belief was reasonable, and whether Ms. Thompson was motivated by racial bias when she deliberately hid from Denise Hendricks the fact that Ms. Thompson had given Petitioner permission to park in either lot, are questions of credibility for a jury to decide.[3]

The Court should not be diverted by Respondent's attempt to distract from the important legal issues presented by the case. The Seventh Circuit found that there was sufficient evidence in the record for a jury to conclude that Ms. Thompson was racially biased and that her racial bias influenced Ms. Hendricks' decision to fire Petitioner. (Pet. at 20a-21a.) Indeed, it is undisputed that Ms. Thompson reported negative information about Petitioner to Ms. Hendricks

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[3] Respondent also argues extraneous, non-record "facts" about the distance of the ILIR parking lot from the PSO (Resp. Br. at 3), presumably in an attempt to discredit Petitioner's testimony that Ms. Thompson authorized him to park at the ILIR lot when she gestured and said he could park "anywhere at the PSO" (Pet. at 3a-4a). On a motion for summary judgment, that type of negative inference may not be made against the non-moving party.

(Pet. at 4a-5a, 7a-8a), and it is undisputed that Ms. Hendricks trusted Ms. Thompson's judgment (Dep. of D. Hendricks, 38:4-15[4]). The negative information relayed by Ms. Thompson to Ms. Hendricks and others consisted not only of information about the parking tag incident (which omitted key exculpatory information about the incident), but also a persistent stream of complaints about Mr. Brewer's attire, the number of hours he worked, and his supposed "lack of urgency." (Pet. at 4a-5a, 7a-8a.) Thus, although Ms. Hendricks testified that she alone determined to fire Petitioner (Pet. at 11a), the facts amply support an inference that, by the time she decided to fire him, Ms. Hendricks' opinion of Petitioner was significantly and irrevocably tainted by the biased information she had received previously from Ms. Thompson. By then, it was virtually impossible for Ms. Hendricks to view the parking tag incident through an objective, independent lens. A jury applying the correct legal standard is the most appropriate means to gauge Ms. Hendricks' credibility on this issue.

Finally, Respondent argues that Ms. Hendricks' "independent investigation" of the facts before firing Petitioner was sufficient to sever the causal link between Ms. Thompson's racial bias and the adverse employment action. (Resp. Br. at 19-20.) But Ms. Hendricks did *nothing* to investigate the situation independently before deciding to fire Petitioner. By

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[4] That Ms. Thompson's complaints about Petitioner influenced Ms. Hendricks' view of him is shown by, among other things, the fact that Ms. Hendricks relayed the substance of Ms. Thompson's complaints to Peter Feuille, the Director of Petitioner's degree program. (Pet. at 7a-8a.)

her own account, Ms. Hendricks resolved to fire Petitioner before getting his side of the story, and her one act of "investigation" was to look at the parking tag.[5] (Pet. at 12a.) Ms. Hendricks also admitted that, if she had known about the situation with Ms. Thompson, that knowledge would have "led to further conversation." (*Id.*) Given that Ms. Hendricks herself acknowledged that the parking tag incident, without more, would not ordinarily result in termination (Pet. at 11a), her failure adequately to investigate the incident is especially telling; a jury could reasonably conclude that Ms. Hendricks considered the parking tag incident the "last straw" after hearing all Ms. Thompson's other complaints about Petitioner, and so Ms. Hendricks fired him when she otherwise would not have.[6] That, of course, is a classic intermediate supervisor bias situation.

Contrary to Respondent's argument (Resp. Br. at 20), the fact that Petitioner may have told Ms. Hendricks that he did something "wrong" by altering the parking tag does nothing to prove that the decision

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[5] Ms. Hendricks denies she was ever told about Ms. Thompson's racism or the implicit permission Ms. Thompson gave Petitioner to alter the parking tag. (Pet. at 12a.) By contrast, Petitioner testified that he informed Ms. Hendricks of Ms. Thompson's racism during the meeting following Ms. Hendricks' decision to fire him. (Pet. at 12a, 56a.) Under either view of the facts, it cannot reasonably be disputed that Ms. Hendricks did not conduct an independent investigation before deciding to terminate Petitioner.

[6] A jury might also reasonably conclude that Ms. Hendricks herself was racially biased, given that she fired Petitioner for the parking tag incident when, by her own admission, that incident ordinarily would not have resulted in termination.

to terminate his employment was not motivated, at least in part, by racism. The determinative question here is simple: Would Ms. Hendricks have fired Petitioner if her opinion of Petitioner had not been poisoned by racially biased information provided to her by Ms. Thompson, or if Ms. Thompson had not withheld from Ms. Hendricks crucial exculpatory information about Petitioner and the parking tag? There is substantial record evidence indicating that Ms. Hendricks would not have done so. Petitioner is entitled to have a jury decide that question once the correct legal standard is articulated by the Court.[7]

CONCLUSION

The Court should act as it did in *BCI* and grant *certiorari* so that a consistent legal standard can be articulated to guide the lower courts, employees, and employers as they confront this important legal issue.

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[7] When a district court applies an incorrect legal standard in an area in which that court has discretion, and the record would permit the district court to exercise its discretion in either direction, the appellate court should remand to allow the district court to decide the issue in the first instance. *See Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 438-439 (1996); *cf. Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

Respectfully submitted this 13th day of September, 2007.

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